

Appl. No. : 10/623,193  
Filed : July 18, 2003

## REMARKS

### Substitute Amendment

In the Communication mailed on March 19, 2007, the Examiner noted several deficiencies in the Amendment filed on December 13, 2006.

This Substitute Amendment addresses the deficiencies noted by the Examiner in March 19, 2007 Communication in these Remarks under the headings "Support for Amendments" and "Restriction Requirement." Otherwise, this Substitute Amendment is identical to the Amendment filed on December 13, 2006 including the amendments to the claims and the drawings, the remarks and the summary of the interview.

### Introduction

Applicant would initially like to thank Examiner Ramana for the courteous interview extended to Applicant, Brad Culbert, and Applicant's counsel, Gerard von Hoffmann, on Monday, November 20, 2006. Applicant has amended the claims along the lines discussed during the interview, which the Examiner agreed would overcome the outstanding rejections. On the basis of the interview and in response to the Office Action mailed June 14, 2006, Applicant respectfully requests the Examiner to reconsider the above-captioned application in view of the foregoing amendments and the following comments.

### Allowed Subject Matter

Applicant notes with appreciation that the Examiner has indicated that Claims 21 and 22 would be allowed if they are rewritten into independent form and that Claim 28 would be allowed after addressing the objection made in the outstanding Office Action.

As discussed in the interview, Applicant has canceled these claims without prejudice such that they can be pursued in a continuation application.

### Elections/Restrictions and previously withdrawn claims

Claims 1-17, 24, 25, 27, 29 and 30 were previously withdrawn as being drawn to a non-elected invention. Claims 1-18, 29 and 30 have been canceled without prejudice and will be pursued in a divisional application.

Claims 24, 25 and 27 remain pending in this application as directed to a non-elected species. These claims depend upon Claim 18, which, as explained below, Applicant respectfully submits is in condition for allowance. Accordingly, Applicant respectfully submits that Claims 24, 25 and 28

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now be considered. Claim 24 has been amended to correct a typographical error. Per CFR 1.121(c), Applicant notes that "withdrawn - currently amended" is an acceptable status identifier.

#### **Provisional Double Patenting rejection**

Applicant notes the provisional non-statutory double patenting rejection of (i) Claims 18, 23 and 25 over Claim 3 of U.S. Patent Application No. 11/056,991 in view of Cachia (USPN 5,893,850) and (ii) Claims 19 and 20 over the '991 application in view of Cachia and further in view of Ray (USPN 5,527,312). Applicant respectfully disagrees with the provisional rejection of these claims.

Nevertheless, Applicant notes that co-pending U.S. Patent Application No. 11/056,991 has not been examined yet. Accordingly, Applicant requests that the provisional rejection be withdrawn and that this application be allowed to progress to issuance. The double patenting rejection, if appropriate, can then be made in the '991 application.

#### **Claim Rejections – 35 U.S.C. §103**

Claims 18-20, 23 and 26 stand rejected under 35 U.S.C. §103 as unpatentable over Ray (USPN 5,527,312) in view of Cachia (USPN 5,893,850). Applicant respectfully disagrees with the rejection of these claims. Nevertheless, to advance prosecution, Applicant has amended Claim 18 along the lines discussed during the interview to recite more structure relating to the proximal anchor. Applicant respectfully submits that, as discussed during the interview, Claim 18 is in condition for allowance because the cited art either alone or in combination does not disclose, teach or suggest a fixation device as recited in Claim 18.

Claims 19-27 depend upon allowable Claim 17 and for at least this reason are also in condition for allowance.

#### **New Claims**

Applicant has added new Claims 31-72. Claims 31-43 depend upon allowable Claim 18 and, for at least this reason, these claims are in condition for allowance.

New independent Claim 44 recites, in part, a method of treating the spine comprising "advancing the distal anchor of the fixation device through a facet of a first vertebra and into a second vertebra" and "moving the proximal anchor distally over retention structures on the body to reduce the distance between the distal anchor and the proximal anchor, such that a locking element on the proximal anchor engages at least one retention structure on the body thereby

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applying compression between the first and second vertebra.” Applicant respectfully submits that this claim is also in condition for allowance. Claims 45-58 depend upon Claim 44 and recite additional patentable subject matter.

New independent Claim 59 recites, in part, a method of treating the spine comprising “advancing the distal anchor of the fixation device through a facet of a first vertebra and into a pedicle of a second vertebra” and “axially shortening the fixation device thereby reducing the distance between the distal anchor and the proximal anchor, such that a locking element on the proximal anchor engages at least one retention structure on the body thereby applying compression between the first and second vertebra.” Applicant respectfully submits that this claim is also in condition for allowance. Claims 60-71 depend upon Claim 59 and recite additional patentable subject matter.

#### **Drawings**

During the interview the Examiner noted that the current application was submitted with informal drawings. Accordingly, enclosed with this amendment are 33 sheets of replacement drawings which include Figures 1-23. The enclosed replacement sheets are the formal replacement to the original informal drawings and do not add any new matter.

#### **Supplemental IDS**

Applicant respectfully notes that an IDS was filed on June 12, 2006 before the mailing of the June 15, 2006 Office Action. Applicant respectfully requests that the IDS be considered.

#### **Support for Amendments**

Claim Number	Support (reference to paragraphs in U.S. Patent Publication No. 2004/0127906)
18.	Paragraph 064, entire paragraph
31.	Figures 4 and 4A and Paragraph 55, lines 1-3.
32.	Paragraph 96
33.	Paragraph 97, lines 13-16.
34.	Paragraph 96
35.	Paragraph 90
36.	Paragraph 90 and Paragraph 5
37.	Paragraph 92

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38.	Paragraph 92
39.	Paragraph 65
40.	Paragraph 65
41.	Paragraph 65
42.	Figure 6F and paragraphs 78 and 79
43	Paragraph 62
44	Original Claim 18 and paragraph 64
45	Original Claim 26
46	Figures 4 and 4A and Paragraph 55, lines 1-3
47	Paragraph 96
48	Paragraph 97, lines 13-16.
49	Paragraph 96
50	Paragraph 90
51	Paragraph 90 and Paragraph 5
52	Paragraph 92
53	Paragraph 92
54	Paragraph 65
55	Paragraph 65
56	Paragraph 65
57	Figure 6F and paragraphs 78 and 79
58	Paragraph 62
59	Original Claim 18 and paragraph 64
60	Original Claim 26
61	Figures 4 and 4A and Paragraph 55, lines 1-3
62	Paragraph 96
63	Paragraph 97, lines 13-16.
64	Paragraph 96
65	Paragraph 90
66	Paragraph 90 and Paragraph 5

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67	Paragraph 92
68	Paragraph 92
69	Paragraph 65
70	Paragraph 65
71	Paragraph 65
72	Figure 6F and paragraphs 78 and 79

#### **Restriction Requirement**

In the March 19, 2007 Office Action, the Examiner requests clarification as to which species the new claims are directed to in light of the restriction requirement mailed on January 21, 2006. Applicant notes that all of the new claims are directed to spinal fixation. With respect to the Species identified in the January 31 Restriction Requirement, Applicant submits that all of the new Claims read on the species 4 (Figures 6E-6I).

#### **CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the rejections set forth in the outstanding Office Action are inapplicable to the present claims. Accordingly, early issuance of a Notice of Allowance is most earnestly solicited.

The undersigned has made a good faith effort to respond to all of the rejections in the case and to place the claims in condition for immediate allowance. Nevertheless, if any undeveloped issues remain or if any issues require clarification, the Examiner is respectfully requested to call Applicant's attorney in order to resolve such issue promptly.

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Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 4-19-07

By: 

Rabinder N. Narula  
Registration No. 53,371  
Attorney of Record 33,043  
Customer No. 20,995  
(949) 760-0404

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